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448-336—71

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-387

THE HERALD COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a–17a) is reported at 444 F. 2d 430. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 18a–32a) are reported at 181 NLRB No. 62. The decision in the representation proceeding is set forth at Pet. App. 32a–52a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a–2a) was entered on July 2, 1971. The petition for a writ of certiorari was filed on September 17, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly concluded that the petitioner's newspaper distributors are employees rather than independent contractors, and thus are protected by the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*), are Section 2(3) (Pet. 3), and:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. THE REPRESENTATION PROCEEDING

The Herald Company publishes The Herald Journal, a daily evening paper, and The Herald

American, a Sunday paper, in Syracuse, New York. It has more than 100 newspaper distributors, divided into various categories: "motor route" distributors, who, alone or with carrier boys, distribute papers to subscribers in rural areas; "city" distributors, who distribute papers to carrier boys for delivery to subscribers in the city of Syracuse and the immediate surrounding area; "street sales" distributors, who deliver newspapers to news dealers such as drug stores and newstand operators, within the city; and "suburban" and "country" distributors, who deliver newspapers outside of the areas of the city and motor route distributors (Pet. App. 34a–35a; A. 272–277, 286–287, 295–297.) [1] In June 1966, Building Service Employees, International Union, Local No. 200, AFL–CIO, filed a representation petition with the Board's Regional Director seeking to represent the Company's distributors (A. 1906).

The evidence at the hearing showed that in 1947 the Company initiated a system for the distribution of its newspapers, whereby, on payment of $1.00, its former district managers were permitted to execute a "franchise agreement" for a term of 3 to 5 years. The territory of the distributor was established by the Company and was substantially the same as that serviced as district manager. The work performed by the distributor also remained substantially the same. (Pet. App. 36a–37a; A. 295–298, 957–961, 1931–1935.)

[1] "Pet. App." refers to the appendix to the petition for certiorari; "A." refers to the 4 volume appendix, and "S.A." to the supplemental appendix, in the court of appeals, copies of which have been lodged with the Clerk of this Court.

This and all subsequent agreements were drawn up by the Company without negotiation with the distributors (Pet. App. 37a; A. 299–301; 315–321, 322–324, 326, 336–342, 374–375, 408–410, 1931–1950).

The most recent contract, drafted by the Company in 1965, gives the distributor the right "to sell and distribute the newspapers" of the Company within a specified territory for a definite time "[s]o long as the distributor shall fully perform the obligations" under his contract (Pet. App. 38a; A. 1907, 2345–2352 (Section 1)). These "obligations" include purchasing a particular quantity of papers at a set price, picking up papers at places and times designated by the Company, submitting circulation reports, and participating in Company promotional campaigns (Pet. App. 38a–39a; A. 2345–2352 (Sections 2, 4, 5, 8, 12)).

The contract establishes the resale rate which the distributor is allowed to charge his carriers and others (Pet. App. 38a; A. 2345–2352, Section 4) and "wholesale price ceilings," which have the effect of increasing the price of the papers to the distributor when his purchases exceed a certain limit (Pet. App. 40a–41a; A.315–320, 1941–1942 (Section 4)). The Company provides distributors with promotion money.[2] If a distributor needs to buy a truck the company will pro-

[2] This money is used to encourage increased circulation and subscriptions, and also to provide the distributor with supplemental income. The Company determines the number and type of promotional activities, the amounts of prize money, and which distributors are entitled to participate. (Pet. App. 41a; A. 310–311, 656–666, 872, 873–878, 1174–1175, 1248–1251, 1252–1257, 1261.)

vide an interest-free loan (Pet. App. 42a; A. 335–336) and pay the distributor a fee for the use of the truck in hauling papers (Pet. App. 42a; A. 281–282, 333–336; S.A. 29–41). The Company pays distributors direct subsidies to compensate for rising operating costs or loss of circulation (Pet. App. 41a, 43a; A. 822–824, 1171–1172; S.A. 25–28). The Company also replaces distributors' papers which are damaged, lost or stolen, and accepts "returns" from street sales distributors (Pet. App. 43a; A. 333–334, 348, 372–373, 1957).[3]

Under the agreement, the distributor must give the Company "30 days' written notice" of intent to "sell, assign or transfer" the distributorship, and supply the name and address of the buyer, the intended purchase price, and the terms and conditions of the buyer's offer; he further agrees to "assign and transfer" all rights in the distributorship to the Company if it elects within the 30-day period to purchase such rights (Pet. App. 39a; A. 1907, 2345–2352, Section 10).

Before a transfer of the distributorship occurs, the Company usually screens the prospective distributor and the terms of the offer. The documents for transfer are normally prepared by the Company. The seller signs a release to the Company, and the Com-

[3] Although the distributor does the actual hiring of the carriers, the Company runs advertisements for them, specifying certain eligibility requirements. It also supplies bonding forms for the carriers, relays instructions directly to them, sets the distributor's resale rate to the carriers, and, on occasion, has insisted that certain carriers be transferred, terminated, or discharged. (A. 365–366, 383, 1958, 2052.)

pany then executes a contract with the new distributor. (Pet. App. 44a–45a; A. 303–311, 380–381, 628–640, 1031–1032, 1088–1090, 1170–1171, 2008.)[4] When the Company looks favorably upon a prospective sale or transfer of a distributorship, it has adjusted wholesale rates in the contract for the purchaser, helped to finance acquisition of the distributorship, granted additional subsidies, promised additional promotion money or adjustments to maintain a profitable operation, and otherwise assisted in the transfer (Pet. App. 44a; A. 1182–1191, 303–314, 2008). The Company has also allowed distributors' contracts to lapse at their termination date, after which the Company has selected a buyer, offered the territory to him at a price established by the Company, and then offered the proceeds to the former distributor less the amount which the Company has expended in operating the distributorship in the meantime (Pet. App. 45a; A. 825, 1125–1129, 970–977, 1302–1303, 2063, 1025–1026, 1033–1035, 1104–1108).

Based on these facts and the additional evidence of control in the extensive record, the Regional Director, applying the "right-of-control" test, concluded that the distributors were "employees" under Section 2(3) of the Act—rather than independent contractors—and that they constituted an appropriate unit for collective bargaining (Pet. App. 50a–51a). The Director explained (Pet. App. 49a–50a):

[4] When the distributorship contract terminates, the customer lists become the property of the Company, and are given to a new distributor (Pet. App. 45a; A. 2345–2352 (Sections 10 and 12)).

> * * * the record clearly shows that in accomplishing the distribution of its newspaper, an integral part of its operation, the Employer has maintained control over the distributors' earnings and the manner and means of accomplishing the results. * * * The Employer unilaterally establishes and controls the various sources of income of the distributors and minimizes the distributors' losses by granting of interest free loans, subsidies, changes in wholesale rates, replacing stolen or damaged bundles, and expense checks for the truck operations. Although the franchise agreement indicates that the distributor has a proprietary interest in the distributorship, the record established that the Employer controls the sale of the franchise and the distributor must first obtain its approval before a sale of the franchise is consummated. The Employer maintains control over the manner and means of the result to be accomplished as evidenced by its memos, instructions and orders for handling complaints, canvassing, investigating and stop orders etc.* * *

The Board denied the Company's request for review on the ground that it raised "no substantial issues warranting review" (A. 81). The Union won the ensuing election (A. 199), and was ultimately certified as the representative of the Company's distributors (Pet. App. 30a).

B. THE SUBSEQUENT PROCEEDINGS

After certification, the Union filed unfair labor practice charges (Pet. App. 5a). The Board found that the Company violated Section 8(a)(5) and (1) of the Act

by refusing to recognize and bargain with the Union based on the certification (Pet. App. 20a–22a).[5] The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discharging 12 distributors and altering the distributors' economic benefits in an effort to discourage union activities. Finally, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees about their union sympathies and activities, threatening them with loss of benefits and discharge, promising them benefits, and engaging in other forms of restraint and coercion (Pet. App. 5a; A. 242–244, 251–255).[6]

The Board ordered the Company, *inter alia*, to bargain with the Union; to reinstate the 12 distributors "or renew, as circumstances require" their agreements; and to make whole those distributors who "suffered loss of subsidies, bonuses, promotion moneys or other emoluments of value" as a result of the Company's discriminatory action (Pet. App. 22a–23a; A. 256–260). The court of appeals sustained the Board's finding that the distributors are employees, as well as its other findings, and enforced its order (Pet. App. 3a–17a).

ARGUMENT

In *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 256, this Court held that

[5] In reaching this conclusion, the Board, upon reexamination of the entire record in the representation proceeding, reaffirmed the prior determination that the distributors are employees within the meaning of the Act (Pet. App. 19a, n. 2).

[6] The Company does not now contest these additional unfair labor practice findings.

"general agency principles" are to be used in distinguishing between employees and independent contractors under the Act[7] and that the reviewing court may not displace "'the Board's choice between two fairly conflicting views'" (*id.* at 260). In the present case, the Board, applying traditional agency criteria, found that the Company exercised substantial control over the distributors' performance of their duties, their incomes, and the value of their distributorships, and that the distributors thus were employees, rather than independent contractors. The court of appeals held that the Board's finding was supported by substantial evidence and that "the very least that can be said for the Board's decision is that it was 'a choice between two fairly conflicting views'" (Pet. App. 11a–12a). Petitioner's challenge to the Board's finding presents, at the most, a factual issue which does not warrant further review.

Petitioner contends, however, that the present case is different from the typical employee-independent contractor situation because the distributors are "franchisees," who own their "own business which can be alienated at will," and who "purchase papers from petitioner, taking title to them and assuming the risk of their loss" (Pet. 17–19). Despite any label the Company chose to put on the relationship, under the facts of this case, the distributors' risk of loss and ability to alienate their interests as well as their

[7] Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor."

direction and control are minimal. The Company compensates the distributors for lost, stolen, or damaged papers; pays them substantial subsidies in addition to the proceeds they receive from the sale of papers; and adjusts the wholesale price of the papers to control each distributor's income. Although the distributor may sell his interest in the distributorship, its value is dependent on the Company's willingness to continue in effect the various subsidies and to renew the contract; the Company thereby maintains effective control over the disposal of the distributorships. In short, the situation which petitioner depicts and labels as a franchise is not supported by the recorded facts of this case.[8]

[8] Similarly, the cases relied on by petitioner (Pet. 33–35) are factually distinguishable. In *National Labor Relations Board* v. *Abell Co.*, 327 F. 2d 1 (C.A. 4), the distributors bore the risk of loss, their income was not dependent on factors within the control of the publisher, and they operated "largely uninhibited by publisher control." *Id.*, at 7. In *Frito-Lay, Inc.* v. *National Labor Relations Board*, 385 F. 2d 180 (C.A. 7), the distributors' "profits depend[ed] entirely upon the difference between the purchase and selling price of the Company's products," and they were free to establish their own resale prices. *Id.*, at 186. The same was true in *Carnation Co.* v. *National Labor Relations Board*, 429 F. 2d 1130, 1132 (C.A. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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